

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE JURISDICTION

SECOND APPEAL NO. 239 OF 1988

1. Hari Bhau Sakpal
age 52 years, cobbler,
R/o. Sangalwadi,
Dist. Sangli, since
deceased, through his heirs
and legal representatives :-
- 1A. Smt. Akka Tai, wd/o. of Hari Sakpal
- 1B. Pandurang Hari Sankpal, 25 years,
Both residing at Parnakuti,
Vikas Mandal, Sewree Cross Road,
Wadala, Bombay- 400 031.
- 1C. Sou. Kalpana Mohan Mane, 25 years.
- 1D. Sou. Jayashree Bhimrao Chaudhari, 40 yrs.
- 1E. Sou. Sunita Sunil Kamble, 19 yrs.
- 1C to 1E are residing at
Shastri Nagar, Kajupada Pipe lane,]
Kurla Andheri Road, Bombay-72
- 1F. Sou. Surekha Navnath Shinde, 17 yrs.
- 1G. Miss. Sashikala Hari Sankpal, 13 yrs.
- 1H. Renuka Hari Sankpal, 14 yrs
- 1I. Radha Dharma Dhumal, 23 yrs
- 1J. Miss. Nakusha Hari Sankpal, 16 yrs.
- 1F to 1J are being minor, represented
by their mother and natural Guardian
No.1A, residing at Parankuti, Vikas
mandal, Sewree Cross Road, Wadala,
Bombay-31.
- 1K. Ranjana Parshuram Karande, 35 yrs,
Ambewadi, Kala Chowki, Bombay .. Appellants.

Versus.

1. Dhondiram Dattatraya Shete, 39yrs,
2. Tanubai Bhairu Sankpal, 76 yrs, since
deceased by his heirs.

3. Gangubai w/o. Maruti Chavan, 41 yrs,
4. Sampat w/o. Bhimrao Mane, 36 yrs. .. Respondents.

Mr. A.P. Vaze, Advocate for Appellants.

Mr. A.A. Kumbhakoni, Advocate for Respondent no.1.

CORAM : ABHAY S. OKA, J.

DATE : 31ST AUGUST, 2004.

ORAL JUDGMENT. :-

1. On April 28th, 1986 this Second Appeal was admitted on grounds (H) and (I) in the Memorandum of Appeal. The said grounds read thus :

"(H) Whether the burden to prove the legal necessity is to be discharged by the purchaser or by the heirs of the Vendor's, when no statement to that effect was mentioned in the Sale Deed or Agreement to sale, is a question of law ?

(I) When the first Respondent has failed to prove with any evidence that there was a legal necessity for the sale transaction, to hold it otherwise on the

basis of the bare statement of the first Respondent is a perverse finding, and as such the said question is a substantial question of law ?

2. Thus it is clear that substantial questions of law were not specifically framed by this Court at the time of admission of the Appeal. This Court was of the opinion that grounds (H) and (I) of the Memorandum of Appeal raise substantial questions of law. I have heard the Counsel appearing for the parties on the said substantial questions of law. With a view to appreciate the submissions made on behalf of the parties it is necessary to refer to the facts of the case.

3. The Second Appeal is filed by Plaintiff no.1. The Respondent no.1 is the Defendant no.1, the Respondent no.2 is the Plaintiff no.2 and the Respondent no.3 and 4 are the Plaintiff nos. 3 and the Defendant no.2 respectively. The case of the Plaintiffs is that the property described in Paragraph no.1 of the Plaint was allotted to the share of Bhairu, the father of the Plaintiff no.1 in a partition between the said father of the Appellant no.1 and his two brothers. The Plaintiff no.2 is the widow of the said Bhairu. The Plaintiff no.1 is the son of Bhairu and the Plaintiff no.3 and the Defendant no.2 are the daughters of Bhairu. The said Bhairu expired on 1st November, 1975 and the Plaintiffs are

claiming to be the legal representatives of deceased Bhairu. The challenge in the suit is to the sale deed dated 30th April, 1975 executed by deceased Bhairu in favour of Defendant no.1 who is the Respondent no.1 herein in respect of half the portion of the house property described in the Paragraph no.1(A) of the Plaint. The case of the Plaintiffs is that when the sale deed was executed by Bhairu, he was ninety five years old and he had lost his memory and therefore the sale deed was got executed by committing fraud and taking undue advantage of old age of deceased Bhairu. The plaintiffs submitted that sale effected by Bhairu is not binding on the Plaintiffs as there was no legal necessity for the sale and the said sale was not beneficial to the Plaintiffs and the original Defendant no.2/Respondent no.2. The Plaintiff stated that the Respondent no.1 has obtained possession of half portion on the eastern portion of the suit house described in Paragraph no.1(A) of the Plaint. The prayer in the Plaint is for setting aside the sale and for possession of the property described in Paragraph no.1(B) of the Plaint. The prayer made in the alternative is that the Respondent no.1/Defendant no.1 has one third share in the suit property on the basis of the sale deed and therefore separate possession of two-third share be granted to the Plaintiffs.

3. The suit was resisted by Respondent no.1 by filing Written Statement. The case of the Respondent no.1 is that

the Plaintiffs and Defendant no.2 never bothered to look after the deceased Bhairu in his old age. Plaintiff no.2 had no source of income and the Plaintiff no.1 had separated from deceased Bhairu long back and the Plaintiff no.1 was residing at Bombay. Specific case made out by the Respondent no.1 is that on the initiative taken by the Plaintiff no.2, the deceased Bhairu sold the properties to the Respondent no.1 for the purpose of earning livelihood and for medical treatment. It is further stated that the property was sold for paying the dues of the Sangli Municipal Corporation. The Respondent no.1 contended that even assuming that the Plaintiffs had share in the suit property, the sale deed has been executed not in respect of the individual share of the Plaintiffs but only in respect of the individual share of deceased Bhairu.

4. The learned Trial Judge partly decreed the suit filed by the Plaintiffs. The learned Trial Judge held that the Plaintiffs are entitled to declaration as regards illegality of the sale deed. The learned Trial Judge passed a decree for partition in favour of the Plaintiffs and the Defendant no.2/Respondent no.2 in respect of the two-third share in the suit house. The learned Judge directed that at the time of effecting the partition, one-third portion which is to be allotted to the Respondent no.1 may be allotted to him from the eastern half portion of the suit house which was in possession of the Respondent no.1. The decree passed by the Trial Court

came to be challenged in the District Court by an Appeal preferred by the Respondent no.1. By Judgment and Decree dated 3rd February, 1988 the learned Second Additional District Judge, Sangli allowed the Appeal and the Suit filed by the Appellant was dismissed.

5. In this Second Appeal filed by the Original Plaintiff no.1, the learned counsel appearing for the Appellant/Plaintiff no.1 submitted that the Appellate Court committed an error by putting burden on the Original Plaintiffs to prove that the suit transaction was not for legal necessity. He submitted that it was for Respondent no.1 purchaser to prove that the transaction was for legal necessity. He submitted that deceased Bhairu has not purported to sell the property of joint family or ancestral property for legal necessity and infact the recitals in the sale deed will show that deceased Bhairu purported to sell his undivided one half share in the suit property in favour of Respondent no.1. He, therefore, submitted that as deceased Bhairu never had one half share in the suit property he could not have sold one half share in the suit property in favour of Respondent no.1. He pointed out there was no evidence to show existence of legal necessity and the burden to prove legal necessity is not discharged by the Respondent no.1. The learned Counsel pointed out that there was no recital in the sale deed that the sale was being effected for legal necessity

and only the basis of the bare statement of the Respondent no.1 legal necessity is not established.

6. Learned Counsel appearing for the Respondent no.1 supported the decree passed by the Appellate Court by contending that there is evidence on record to show that deceased Bhairu had taken loan for various purposes. He pointed out that deceased Bhairu had hardly any income and Appellant was residing separately from Bhairu . There were no funds available for medical treatment of Bhairu. He pointed out that the agreement for sale which was executed prior to the execution of the sale deed will clearly establish that deceased Bhairu was indebted and had taken loan from Respondent no.1 for his own survival and for payment of municipal taxes. The learned counsel submitted that though the points for determination framed by the Appellate Court may indicate that the burden of proving legal necessity was placed on the Original Plaintiffs, the discussion in the Judgment clearly shows that the Appellate Court was conscious of the fact that the burden to prove the existence of legal necessity was on the Respondent no.1. He submitted that what was required to be established by the Respondent no.1 was the existence of legal necessity and it was not necessary for the Respondent no.1 to show that every part of the consideration which was received by deceased Bhairu was actually applied for meeting the family necessity. He submitted that no

interference was called for in the Second Appeal under Section 100 of the Civil Procedure Code, 1908 (hereinafter referred to as the said Code).

7. I have considered the rival submissions. Perusal of the Plaint shows that it is not the contention of the Plaintiffs that deceased Bhairu purported to sell only his individual share in the suit property. The case made out by the Plaintiffs is that the sale deed was obtained by fraud and in the alternative the Plaintiffs submitted that there was no legal necessity for effecting the sale transaction. Therefore at the time of the trial the parties proceeded on the footing that deceased Bhairu in his capacity as the Karta of the family purported to sell the ancestral property in his hands by the sale deed in dispute. From the evidence on record it appears that the parties proceeded with the trial with a clear understanding that the only issues to be decided were whether there was any legal necessity for effecting the transaction and if there was no legal necessity in existence, what was the share to which deceased Bhairu was entitled to.

8. Perusal of the points for determination framed by the Appellate Court shows that the Appellate Court proceeded on assumption that the burden was on the plaintiffs to prove that the suit transaction was not for legal necessity. The point no.2 for determination reads thus :

"2) Do Plaintiffs prove, in the alternative, that the suit transaction was not for legal necessity, and therefore, not binding on the share of the Plaintiffs?"

9. It is necessary to refer to the findings recorded by the Appellate Court. On the basis of the said point for determination framed by the Appellate Court, In paragraph no.9 of the Judgment the Appellate Court has discussed the issue of legal necessity. After referring to the evidence the Appellate Court has recorded following findings :

"It is pertinent to note that it is nowhere alleged that Bhairu was addicted to any vices or that he was extravagant in any way. It, therefore, can be said with reason and profit that Bhairu, in all probability and at any rate, must have disposed of the suit property to meet his medical expenses and other domestic needs, especially when the suit house was disposed of for Rs.3,000/- which amount seems to be meagre one and the consideration seems to be adequate and sufficient one. Therefore, there is no scope for the inference that Bhairu did not sell out the property for the purpose of legal necessity of the joint family. The joint family is liable to meet the

expenses of Bhairu's illness during his advance age. Moreover, Bhairu died in the month of November, 1975 and the sale-deed is executed in the month of April, 1975. That means Bhairu must have been in the need of cash amount. As already stated above, there is absolutely no evidence to show that he was not in sound disposition of mind. Therefore, it can be said afortiary that deceased Bhairu was in need of cash amount to meet his medical expenses and family needs,. For the reasons discusses herein above, what can be concluded with certainty is that the Defendant no.1 has discharged his burden of provisions that there was legal necessity, even if there is no mention of this in the agreement deed or in the sale-deed."

10. Therefore, all that the Appellate Court has held is that, deceased Bhairu must have disposed of the property in all probability to meet his medical expenses and other domestic needs. The Appellate Court came to the conclusion that Bhairu must have been in need of cash amount to meet his medical expenditure and family needs. Therefore it is very clear to me that the findings recorded by the Appellate Court are based only on probabilities. While framing the point for determination on the aspect of legal necessity as stated earlier, burden is put on the Original Plaintiffs. Law on this point is very clear if an alienation made by the 'Karta'

of the joint family property is challenged by the members of the joint family on the ground that there was no legal necessity for effecting the alienation, the burden to prove the existence of legal necessity is on the purchaser. Therefore, it is obvious that the Appellate Court has committed an error in framing the point for determination.

11. However, in the last part of Paragraph no.9 of the Judgement the Appellate Court has observed that the Respondent no.1/Defendant no.1 has discharged his burden of proving that there was a legal necessity. The said observation of the Appellate Court indicates that the Appellate Court was conscious of the fact that the burden of proving the existence of legal necessity was on the Respondent no.1 purchaser. Thus the finding recorded by the Appellate Court on the existence of legal necessity is very vague and not at all satisfactory as it is based only on conjectures. The said finding is not based on evidence on record.

12. It is an admitted position that insofar as the document of sale is concerned there are no recitals therein to the effect that the property is purportedly sold for legal necessity. The recitals in the sale deed show that the Respondent no.1/Purchaser paid a sum of Rs.400/- prior to the execution of the sale deed to the deceased Bhairu and the balance amount was paid before the Sub-Registrar. There is an

agreement for sale Exhibit-36 allegedly executed by Bhairu in favour of Respondent no.1 on 17th February, 1975. The agreement is in respect of the entire house property which records that sum of Rs.400/- was paid as earnest money by the Respondent no.1 to deceased Bhairu on the date of execution of agreement. It is thus apparent that no reference in the sale deed to the sum of Rs.400/- allegedly paid by the Respondent no.1 to Bhairu on 17th February, 1975 at the time of execution of the alleged agreement for sale. Reliance was also placed by the Respondentno.1 on the two receipts executed by deceased Bhairu on 17th February, 1975 and 7th March, 1975 which according to the Respondent no.1 shows that deceased Bhairu borrowed a sum of Rs.100/- and Rs.,400/- respectively for the payment of house taxes. The said receipts do not indicate that deceased Bhairu had agreed to repay the said amount within a particular time or that the said amount had become payable at the time when the sale deed was executed. In this regard, it is necessary to refer to the case made out by the Respondent no.1 in evidence. The Respondent no.1 has stated that deceased Bhairu and his wife were surviving only on the rent recovered from the tenants in the suit property which was not sufficient and therefore the property was sold. Incidentally, the Respondent no.1 has referred to the alleged advance of Rs.400/- and Rs.100/- allegedly made by the Respondent no.1 to deceased Bhairu. However, no case is made out that the property was required to be sold for the

repayment of amount which was allegedly received by deceased Bhairu from the Respondent no.1. Therefore, no case is made out at the time of leading evidence by the Respondent no.1 that the property was required to be sold for the purpose of the discharge of the loan taken from the Respondent no.1. The alleged loan was advanced by the Respondent no.1 himself in February and March, 1975 and it was not even his case that the said amount advanced was repayable immediately. Infact in the evidence, repayment of loan is not at all pleaded as existence of legal necessity. Only legal necessity which is pleaded is that income received by deceased Bhairu from the tenants was not sufficient for Bhairu and his wife to maintain themselves. Reference is made in the evidence to the offer given by the Plaintiff no.2 and Bhairu for selling the property on account of financial difficulty for medical treatment as well as for day to day livelihood. But a specific case made out in Paragraph no.1 is that the income from the property was not sufficient for Bhairu and therefore he sold the property. The case tried to be made out in the Second Appeal that the property was required to be sold for discharge of the debt incurred by deceased Bhairu cannot be accepted as it is not at all the case made out in the evidence by the Respondent no.1. The Appellate Court has observed that in all probability the deceased must have disposed of the suit property to meet his medical expenses. It is pertinent to note here that there is clear finding recorded by the Trial Court in Paragraph no.15

that there was income available to Bhairu from which "he was in a position to meet his livelihood." The said finding recorded by the Trial Court in Paragraph no.15 is not specifically upset by the Appellate Court.

12. The Trial Court's finding regarding failure of Respondent no.1 to prove the legal necessity has been overturned by the Appellate Court by presuming that Bhairu must have been in need of the cash amount. The said finding hardly proves the existence of legal necessity on the part of the deceased Bhairu. The learned counsel for the Respondent no.1 has placed reliance on certain judgments of the Apex Court. There cannot be any dispute that in the event, if it is shown that the 'karta' of the Joint Hindu Family disposes of the Joint Family property for discharge of debts incurred by him or he disposes of the property on the ground that he needs amount for his own maintenance and for the maintenance of the family, the legal necessity is established. However such a case of effecting sale by Bhairu on the ground of requirement of discharge debt is not specifically made out in the evidence of the Respondent no.1. Thus the Appellate court could not have set aside the finding recorded by the Trial Court on the issue of the existence of legal necessity only on the basis of probabilities. Therefore, it is clear that there was no legal necessity for the execution of the sale deed.

13. This takes me to the next question as to what should be the decree passed in favour of the Original Plaintiffs. A contention has been raised in this Appeal that in absence of partition of the property held by Bhairu, the property being house property, the Respondent no.1 is not entitled to possession of any specific portion of the suit house. It is noted here that in the plaint an averment has been made that one half portion on the eastern side of the house is in possession of Respondent no.1. The Trial Court had not passed decree for possession in respect of the said one half portion of the house. In Appeal preferred by the Respondent no.1, cross objections were filed by the Original Plaintiffs nos.1 and 3 in which ground no.4 was raised that possession ought to have been awarded to the Plaintiffs. The perusal of the judgment of the Appellate Court shows that there is no reference to the cross objections filed by the Plaintiff nos.1 and 3. Thus from the judgment of the Appellate Court it is apparent that no contention were advanced by the Plaintiff nos.1 and 3 on the basis of the cross-objections. Even in the Memorandum of Appeal of the Second Appeal, no grievance has been made that arguments were advanced on the basis of cross-objections and still cross-objections are not decided on merits. The Appellate Court has not decided the cross-objections. It is therefore apparent that the cross-objections were not pressed into service by Plaintiff nos. 1 and 3 and there was no serious challenge by the

Plaintiffs to the decree passed by the Trial Court.

14. It is an admitted position that the property in the hands of Bhairu was ancestral property. Bhairu was survived by his son Appellant no.1 and his widow who were entitled to a share equal to that of Bhairu in the said property. Bhairu died after coming into force of the Hindu Succession Act, 1956 and therefore in view of the provisions of section 6 of the said Act of 1956 Bhairu could have claimed only one-third share in the house property. Therefore, the sale deed executed by Bhairu will bind the Plaintiffs and the estate held by Bhairu only to the extent of one-third share. The Trial Court passed a decree for partition and separate possession in favour of the Plaintiffs and Defendant no.2. It is apparent from clause 1 of the operative part of the decree passed by the Trial court, reference to one-sixth share is made due to mistake and the reference is to one-third share. Therefore, the decree passed by the Appellate Court will have to be quashed and set aside and the one which is passed by the Trial Court will have to be restored. Hence, I pass the following order.

ORDER

(i) The Appeal is allowed. The Decree passed by the Appellate Court is quashed and set aside and the

Decree passed by the Trial court is restored with the clarification that reference to one-sixth share in Clause one in the operative part of the Decree will have to be read as a reference two-third (2/3rd) share.

(ii) There will be no orders as to costs.

. C.C. expedited.

SD/-

JUDGE